



DEPARTMENT OF THE AIR FORCE
ARLINGTON, VA 22203-1613

JUL 08 2009

Office of the Deputy General Counsel

FILE COPY

MEMORANDUM IN SUPPORT OF THE DEBARMENTS OF:

APC SUPPLY, INC.
JIMMY HARPER
SHANNON HARPER
SEBRON B. WILLIAMS, JR.

On April 8, 2009, the Air Force proposed the debarments of APC Supply, Inc., Jimmy Harper, Shannon Harper, and Sebron B. Williams, Jr. from Government contracting and from directly or indirectly receiving the benefits of Federal assistance programs. The actions were initiated pursuant to Federal Acquisition Regulation (FAR) Subpart 9.4.

By correspondence dated April 28, 2009, the designated counsel for all parties submitted matters and arguments in opposition to the proposed debarments, and on May 15, 2009, submitted additional matters and arguments in opposition of Williams' proposed debarment. All matters and arguments in opposition to the proposed debarments (the submissions) on behalf of APC Supply, Inc., Jimmy Harper, Shannon Harper, and Sebron B. Williams, Jr. (collectively "Respondents"), and all information in the administrative record (the record) have been read and carefully considered.

INFORMATION IN THE RECORD

Information in the record establishes by a preponderance of evidence that at all times relevant hereto:

1. APC Supply, Inc. (APC) was a miscellaneous industrial supplier to the United States Air Force (USAF). S&G Supply, Inc. (S&G) was also an industrial supply vendor to the USAF.
2. Sebron B. Williams, Jr. (Williams) was the President of APC, and Jimmy Harper was Secretary-Treasurer and Chief Financial Officer of APC. 100% of capital stock is owned by the officers, Williams and Jimmy Harper. Williams and Jimmy Harper are the only principal officers associated with APC.
3. Shannon Harper was the owner and Chief Executive of S&G until it dissolved on July 9, 2005. Shannon Harper was also an employee of APC.
4. Tommy Huff (Huff) was employed at Robins Air Force Base (Robins AFB), Georgia, as a civilian employee. Huff worked in the Maintenance Directorate, and he was authorized to purchase items for the Air Force by using an Air Force issued Government Purchase Card (GPC).

5. Steve Deason (Deason) was employed at Robins AFB, Georgia, as a civilian employee. Deason worked in the Maintenance Directorate, and he was authorized to purchase items for the Air Force by using an Air Force issued GPC.

6. Lorenzo Jones (Jones) was employed at Eglin Air Force Base (Eglin AFB), Florida, as a civilian employee. Jones was authorized to purchase items for the Air Force by using a Government-issued Visa.

7. Pat Merrill (Merrill) was employed at Malstrom Air Force Base (Malstrom AFB), Montana, as a civilian employee. Merrill was authorized to purchase items for the Air Force by using a Government-issued Visa.

8. From approximately February 2000 through June 2003, Jimmy Harper and Shannon Harper (the Harpers), individually and through their companies, APC and S&G, did knowingly conspire to commit wire and mail fraud against the United States. These fraudulent activities were conducted with the full knowledge and participation of Robins AFB employees Huff and Deason.

- a. Huff and Deason placed orders for supplies and materials for the Air Force by faxing and emailing orders to APC and S&G.
- b. Many of these orders were never delivered to Robins AFB, or they were delivered in lesser quantities than ordered.
- c. The Harpers created fraudulent invoices to make it appear that the ordered items had been purchased and delivered to Robins AFB.
- d. APC and S&G submitted invoices by U.S. Mail to the Defense Finance Accounting Service (DFAS), and DFAS paid APC and S&G by wiring funds electronically to the companies' bank accounts.
- e. The Harpers paid illegal kickbacks and gratuities to Huff and Deason in the form of cash, services, and gifts in order to receive orders from these Government employees.

9. From approximately January 2000 through April 2004, the Harpers, individually and through their companies, APC and S&G, did knowingly conspire to commit wire and mail fraud against the United States. These fraudulent activities were conducted with the full knowledge and participation of Eglin AFB employee Jones.

- a. Jones would telephone and transmit by facsimile an order to APC for personal merchandise including, but not limited to, computers, televisions, and a camcorder.
- b. APC would then forward a fraudulent invoice to Jones indicating that Jones had placed an order for government-approved expenses such as "metal" and "aluminum."
- c. Jones would submit his Government-issued Visa card to pay for these personal items, and APC would charge his Government Visa card.
- d. APC ordered and delivered these personal items to Jones on his behalf.

- e. The government-approved expenses listed on the fraudulent invoices were never ordered or delivered to Eglin AFB.

10. From approximately February 2000 through December 2000, the Harpers, individually and through their companies, APC and S&G, did knowingly conspire to commit wire and mail fraud against the United States. These fraudulent activities were conducted with the full knowledge and participation of civilian and military employee Merrill at Malstrum AFB, Montana.

- a. Merrill would telephone an order to APC for personal, hobby-related merchandise such as remote controlled aircraft and remote controlled vehicles.
- b. APC would then forward a fraudulent invoice to Merrill indicating Merrill had placed an order for government-approved expenses such as supplies and materials.
- c. Merrill would submit his Government-issued Visa card to pay for these personal items, and APC would charge his Government-issued Visa card.
- d. APC ordered and delivered these personal items to Merrill on his behalf.
- e. The government-approved expenses listed on the fraudulent invoices were never ordered or delivered to Malstrum AFB.

11. On March 2, 2004, the United States filed criminal charges in the United States District Court for the Middle District of Georgia, Macon Division (USDC-M.D. Ga.) against Jimmy Harper and Shannon Harper, alleging conspiracy to commit wire and mail fraud. The Harpers entered into a plea agreement with the AUSA by which the Harpers agreed to plead guilty to the Information and to cooperate and assist the government in its continued investigation into the conspiracy to commit wire and mail fraud using Government-issued Visas and GPCs.

12. On March 2, 2004, the Harpers pleaded guilty to Count One of the Information, Conspiracy to Commit Wire and Mail Fraud, in violation of Title 18 U.S.C. § 371, in connection with §1341 and § 1343. On August 13, 2008, the Harpers were sentenced to be imprisoned for a term of 14 months each and ordered to pay two criminal monetary penalties, (1) an assessment of \$100.00 each and (2) restitution to the United States Treasury in the amount of \$241,875.05.

ANALYSIS

Respondents' submissions do not refute any of the facts presented above. Instead, Respondents argue that the Harpers should not be debarred because (1) the Harpers assisted the Government in its investigation of other co-conspirators and are paying restitution to the Government; (2) the Harpers were "naïve" and "in many instances" were unaware that the items were being fraudulently purchased by government employees; and (3) the proposed debarments are a form of punishment in violation of FAR 9.402(b). These arguments are not persuasive. The Harpers have failed to meet their burden of demonstrating that they are presently responsible and that their debarments are not in the public interest.

Respondents argue that Williams should not be debarred because (1) Williams was neither convicted of a crime, nor was he ordered to pay restitution to the Government; (2) Williams was not involved in the management or daily operation of APC, he was not an employee of APC, and he did not receive a salary from APC; (3) Williams owns another business that will be affected by his inability to obtain government contracts; and (4) Williams' proposed debarment is a form of punishment in violation of FAR 9.402(b). These arguments are not persuasive. Williams has failed to meet his burden of demonstrating that he is presently responsible and that his debarment is not in the public interest.

Respondents also argue that APC should not be debarred from government contracting because (1) the offenses occurred six years ago, and since then APC has continued to do business (totaling approximately \$15 million) with the military to the complete satisfaction of the Government; (2) Jimmy Harper has had no financial interest in APC or served in a management capacity since January 2008, and upon receipt of the Notice of Proposed Debarment, Jimmy Harper terminated his employment with APC; and (3) the current employees at APC were not employees at the time of the misconduct. These arguments are not persuasive. APC has failed to meet its burden of demonstrating that APC is presently responsible and that its debarment is not in the public interest.

A. Points of Consideration Offered in Opposition to the Proposed Debarments of the Harpers

1. The Harpers assisted the Government in its investigation of other co-conspirators, and they are paying restitution to the Government.

The Harpers provided truthful and reliable information relating to their part in the conspiracy, and as a result of the Harper's cooperation, several government employees were successfully prosecuted for their involvement in the mail and wire fraud conspiracy. In his May 29, 2008, memorandum to the U.S. Probation Office, AUSA George Christian advised that, "In my approximately 25 years of prosecution I have never seen the level, extent and quality of cooperation by defendants in any other criminal case." AUSA Christian further stated that, "The Government does not believe that Shannon and Jimmy Harper will repeat their criminal conduct" and, "We do not object to both Shannon and Jimmy Harper being placed on probation." AUSA Christian also confirmed in his May 2008 memorandum that the Harpers had repaid approximately \$75,000 of the \$342,377 they agreed to pay as restitution per their plea agreement.

I accept AUSA Christian's statements as evidence that the Harpers cooperated fully with Government agencies during the investigation of others involved in the conspiracy, and also that the Harpers have been paying restitution to the Government. However, there is no evidence in the record that at the time of the misconduct, a period spanning at least four years, the Harpers voluntarily brought the wrongdoing to the attention of the appropriate Government agency in a timely manner. The Harpers' decision to enter into a plea agreement, while indisputably beneficial to the Government, was also in their best interest, as the Harpers were each facing a maximum sentence of five years imprisonment, a maximum fine of \$250,000, and restitution in

the amount of \$342,377. While the Harpers' remedial actions are a point of consideration and a correct step towards mending the Harpers' contractual relationship with the Government, they are insufficient to meet the Harpers' burden of demonstrating that they are presently responsible and that their debarments are unnecessary.

2. The Harpers were "naïve" and "in many instances" were unaware that items were being fraudulently purchased by government employees.

In their April 28, 2009, submission, the Respondents offer that "in *many* instances" the Harpers were unaware that the items being purchased by government employees were unauthorized purchases (emphasis added). There is undisputed evidence in the record that the Harpers paid illegal kickbacks and gratuities to government employees in the form of cash, services, and gifts in order to receive these unauthorized orders. Furthermore, Respondents acknowledge by the very use of the word "many" that there were *some* instances in which the Harpers knowingly and willfully conspired with these government employees who were, as Respondents' submission accurately notes, "found to have abused their position of trust by fraudulently using their Government issued GPC (Visa) credit cards to purchase personal items." Respondents' statement that the Harpers' were "somewhat naïve" offers no evidence of their present responsibility or that their debarments are unnecessary.

3. The proposed debarments of the Harpers are a form of punishment.

Respondents' April 28, 2009, submission asserts that the proposed debarments are a form of punishment in violation of FAR 9.402(b), rather than actions imposed only in the public interest for the Government's protection. Respondents state, "Issuing a debarment now after more than six years [since the date of the initial FBI investigation and the date of the Harpers plea agreement] and after the Harpers and the Company have continued to be awarded Government Procurement Contracts would be tantamount for their being debarred for purposes of punishment." [sic] Relying on the administrative holding *In the Matter of the Proposed Debarment of Nelson Murray*, Docket No. 96-43-DA, which found that a four-year delay in bringing an otherwise legitimate debarment proceeding amounted to punishment, Respondents liken their proposed debarments to that of Murray's, despite the fact that the controlling date in *Murray* was the date Murray was convicted and sentenced, not the date he entered into a plea agreement with the Government.¹

In *Murray*, unbeknownst to Mr. Murray, the Department of Education initiated a debarment action against him several months after his July 1992 conviction. Within a few weeks, however, this action was withdrawn in order to obtain additional favorable testimony from Mr. Murray. In April 1996, almost four years after Mr. Murray's *sentencing*, the Department of Education reinitiated the debarment action against him. Ultimately, a Deciding Suspension and Debarment Official (SDO) found that the proposed debarment of Mr. Murray could not stand because the Government waited too long to prosecute a debarment action. The SDO found that the originally pursued debarment action, several months after Mr. Murray's conviction, was the appropriate time to prosecute Mr. Murray's debarment.

¹ The finding of another agency's debarring official is neither binding generally, nor persuasive under the facts of the two cases.

Like Mr. Murray, who entered into a plea agreement with the Government several years before his sentencing, the Harpers entered into a similar plea agreement with the Government several years before their sentencing. Like Mr. Murray's sentencing, the Harpers' sentencing was also postponed as they assisted the Government in its prosecution of other individuals. Unlike the debarment proposed for Mr. Murray, which was delayed nearly four years after his sentencing, Respondents were proposed for debarment within months of the Harpers' sentencing. Respondents incorrectly apply the holding in *Murray*; consequently, the decision in *Murray* is not persuasive.

Further, the fact that government agencies continued to award contracts to APC after APC's misconduct was known, and before its proposed debarment, is not relevant. It is neither probative of its present responsibility, nor does it establish that the debarment is imposed as punishment (See *Kirkpatrick v. White*, 351 F. Supp. 2d 1261, 1282-1296 (N.D. Ala. 2004)). Finally, the debarment was not entered as punishment, as evidenced by my findings that the debarment is necessary to protect the Government's interests.

B. Points of Consideration Offered in Opposition to the Proposed Debarment of Williams

1. Williams was neither convicted of a crime, nor was he ordered to pay restitution to the Government.

In his May 15, 2009, submission, Williams correctly states that he was never charged, indicted, or convicted of any crime related to the misconduct which is the cause for the proposed debarments. However, Williams, by his own admission, is a shareholder and an officer of APC, and evidence in the record confirms William's affiliation with APC: a May 2009 Dun and Bradstreet report cites Williams as the President and as one of two officers and shareholders of APC, and the Georgia Secretary of Annual Registration History reports Williams as the Chief Executive Officer (CEO) of APC. The affiliation of Williams and APC is undisputable, and with respect to FAR 9.406-5(b), his proposed debarment is appropriate.

2. Williams was not involved in the management or daily operation of APC, he was not an employee of APC, and he did not receive a salary from APC.

Williams' May 15, 2009, assertion that he is not an employee of APC and did not receive a salary from APC does not relieve him of his affiliation with APC, and it does not establish that he is presently responsible. The record establishes that Williams is one of two shareholders of APC, the President and CEO of APC, had the power to control APC, and inevitably did and does benefit financially from his business affiliation with APC.

Williams argues further that because he was not involved in the management or daily operation of APC and thus, had no knowledge of the improper conduct, his proposed debarment is improper. However, as the President and CEO of APC, Williams knew, or *had reason to know*, of the improper conduct within his own company—egregious conduct which spanned over

several years and resulted in substantial fraud against the Government. As such, Williams' argument is not persuasive and offers no assurance of his present responsibility.

3. Williams owns a separate business, not affiliated with APC, which will be affected by his inability to obtain government contracts.

In his May 15, 2009, submission, Williams attempts to distance himself from the Harpers and APC; nevertheless, the record reveals Williams' affiliation with APC, and that he maintains a business relationship with both Jimmy Harper and APC. Williams' inability to obtain government contracts is a consequence of both his past and present affiliation with APC and the Harpers, the gravity of the crimes committed, and the lack of evidence establishing Williams' present responsibility.

4. The proposed debarment of Williams is a form of "punishment."

In his May 15, 2009, submission, Williams argues that his proposed debarment is a form of punishment in violation of FAR 9.402(b), rather than an action imposed only in the public interest for the Government's protection. Like the Harpers, Williams relies on the decision in *Murray* to support his argument: "The subject matter that resulted in the Harper criminal case happened approximately six years ago...any debarment now of Mr. Williams after six years – as was clearly stated in the matter of the proposed debarment of Nelson Murray – transforms an otherwise act for the protection of the public interest into a form of punishment..."

As discussed above, Respondents incorrectly apply the Department of Education's debarment official's decision in *Murray* to the present situation. Unlike the debarment proposed for Mr. Murray, which was delayed nearly four years after his sentencing, Respondents, including Williams, were proposed for debarment within months of the Harpers' sentencing. Nothing in the record suggests that the proposed debarment of Williams—or of any of the Respondents—is impermissible punishment. Respondents, including Williams, have failed to meet their burden of demonstrating that they are presently responsible, and that their debarments are not in the public interest.

C. Points of Consideration Offered in Opposition to the Proposed Debarment of APC Supply, Inc.

1. The offenses occurred six years ago, and since then APC has continued to do business [approximately \$15 million] with the military to the complete satisfaction of the Government.

In their April 28, 2009, submission, Respondents offer as evidence of APC's present responsibility the fact that since the offenses occurred, APC has continued to contract with the military "to the complete satisfaction of the Government." This is neither legally significant, as explained², nor does it evidence APC's present responsibility. The misconduct is egregious, and Respondents have failed to offer any evidence that APC, as a company, has implemented

² *Supra* pp. 5-6

2. Jimmy Harper has had no financial interest in APC or served in a management capacity since January 2008, and upon receipt of the Notice of Proposed Debarment, he terminated his employment with APC.

Respondents offer that Jimmy Harper is no longer involved in the management of the company as a mitigating factor in favor of not imposing the debarment of APC. In fact, since January 2008, Respondents claim that Jimmy Harper has not been a stockholder of APC, he has not had any financial interest in APC, and he has not exercised management authority. Upon receipt of the proposed debarments, Respondents assert that Jimmy Harper terminated his employment with APC.

The evidence in the record is contrary to the foregoing claims offered by Respondents. As of May 20, 2009, a Dun & Bradstreet report confirms that Jimmy Harper and Sebron Williams are still the sole officers of APC and own 100% of the capital stock. Assuming Respondents' claims are truthful, however, the fact that Jimmy Harper's employment only terminated upon receipt of the proposed debarments, and the fact that he remained an officer of APC for nearly four years after the misconduct occurred—misconduct that he was responsible for—are points of consideration that are not in favor of finding that APC, of its own accord, took steps to establish its present responsibility.

3. None of the current employees of APC were employed at the time of the misconduct.

In their April 28, 2009, submissions, Respondents offer as a point of consideration that "none of the current employees at APC were employed during the time of the wrongdoings." However, evidence in the record establishes that the sole officers of APC remain Sebron Williams and Jimmy Harper, and Respondents have failed to provide evidence to the contrary. Nevertheless, assuming Respondents claims are accurate—that Jimmy Harper is no longer an officer or employee of APC and Williams was merely a shareholder and uninvolved in the management or daily operation of APC—the question of APC's present responsibility still remains because, among other things, Respondents have failed to establish who is presently involved in the management and daily operation of APC and what plans and procedures have been implemented to ensure its present responsibility.

FINDINGS

1. The convictions against the Harpers provide separate independent bases for their debarments pursuant to FAR 9.406-2(a)(1) and (5).
2. The improper conduct of the Harpers is of so serious or compelling a nature that it affects their present responsibility to be Government contractors or subcontractors and provides a separate independent basis for each of their debarments pursuant to FAR 9.406-2(c).
3. Pursuant to FAR 9.406-5(a), the seriously improper conduct of the Harpers is imputed to APC because their seriously improper conduct occurred in connection with the performance of

their duties for or on behalf of APC or with APC's knowledge, approval, or acquiescence. The imputation of the Harpers' improper conduct to APC provides a separate independent basis for the debarment of APC.

4. The improper conduct of APC is of so serious or compelling a nature that it affects its present responsibility to be a Government contractor or subcontractor and provides a separate independent basis for its debarment pursuant to FAR 9.406-2(c).


5. Pursuant to FAR 9.406-5(b), the seriously improper conduct of APC is imputed to Williams, because as an officer, director, shareholder, partner, employee or other person associated with APC, he knew or had reason to know of APC's seriously improper conduct. The imputation of APC's seriously improper conduct to Williams provides a separate independent basis for his debarment.

6. Pursuant to FAR 9.406-1(b), debarments may be extended to the affiliates of a contractor. Williams and APC are affiliates, as defined by FAR 9.403, because directly or indirectly, Williams has the power to control APC. The affiliation of Williams and APC provides a separate independent basis for each of their debarments.

7. The criminal conduct of the Harpers was repeated and egregious. A period of debarment in excess of the three years generally imposed under the FAR is required to protect the Government's interests. In recognition also of the Harpers' cooperation, I find that a debarment period of five years is sufficient.

DECISION

Pursuant to the authority granted by FAR subpart 9.4, Defense FAR Supplement subpart 209.4, and 32 C.F.R. Section 25, and based on the evidence contained in the administrative record and the findings herein, APC Supply, Inc. and Sebron B. Williams are debarred for a period of three years from April 8, 2009, the date of their proposed debarment. Their debarments shall terminate on April 7, 2012. Jimmy Harper and Shannon Harper are debarred for a period of five years from April 8, 2009, the date of their proposed debarment. Their debarments shall terminate on April 7, 2014.


STEVEN A. SHAW
Deputy General Counsel
(Contractor Responsibility)